Court File No.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Applicant

- and -

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Respondents

WRITTEN SUBMISSIONS OF MARGARITA CASTILLO
(Motion of the Receiver Returnable October 29, 2019)

October 25, 2019

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TO: SERVICE LIST

A. Overview

1. Xela Enterprises Ltd. ("**Xela**") is a judgment debtor to the applicant, Margarita Castillo ("**Margarita**"), pursuant to a judgment issued in this proceeding on issued October 28, 2015 (the "**Oppression Judgment**") and various subsequent cost orders. Despite Margarita's extensive enforcement efforts, the judgment debt remains in excess of $4 million. To aid in enforcement of the judgment, Margarita moved for an order appointing a receiver over Xela. After initially contesting the motion, Xela ultimately consented to an order on negotiated terms, which Justice McEwen approved and adopted with the appointment order issued on July 5, 2019 (the "**Receivership Order**").

2. The receiver, KSV Kofman Inc. (the "**Receiver**"), has brought this motion to, among other things, (i) compel the disclosure of information relevant to certain transactions in 2016 and 2018 that resulted in valuable assets being transferred from wholly-owned Xela subsidiaries into the ARTCARM Trust, and (ii) clarify the meaning of paragraph 4 of the Receivership Order.

3. Margarita supports the Receiver's motion, and agrees with its interpretation of paragraph 4 of the Receivership Order, for reasons that will be briefly summarized below. Capitalized terms not defined in these submissions have the meaning given to them in the First Report of the Receiver dated October 17, 2019 (the "**First Report**").

B. Putting the Suspicious Transactions in Historical Context

4. Xela was originally founded by Margarita's father, Juan Arturo Gutierrez ("**Arturo**"), as a vehicle for his investments and business ventures. Xela was not an operating business itself, but rather a holding company that centrally managed a complex international network of direct and indirect subsidiaries (collectively, the "**Xela Group**"). Arturo's indirect one-third interest in

the Avicola Group is the crown jewel asset of the Xela Group, and it has been indirectly owned by Xela since Xela's inception in the 1980s.[1]

5. Although the Xela Group includes many different legal entities, it historically functioned as a single collective economic unit. This is reflected, for example, in the high volume of related party transactions, and the historical management of the Avicola Litigation by the Xela board of directors. The value of the collective Xela enterprise was structured to be shared among Arturo's family. In particular, as part of an estate freeze executed in 1996, the common shares of Xela were deposited into a trust benefiting Arturo's grandchildren, while Margarita and her brother, Juan Guillermo Gutierrez ("**Juan**"), were issued fixed-value preference shares of Xela, redeemable only after Arturo's death.[2]

6. The First Report describes that a series of transactions in 2016 and 2018 has effectively carved out the Xela Group's most valuable assets, and put them into a trust (the ARTCARM Trust), the only known beneficiaries of which are Juan's children. ARTCARM appears to be a reference to Arturo and Carmen, the names of Juan and Margarita's parents. The transactions described in the First Report deserve real suspicion as a potentially voidable attempt to defeat Margarita's judgment debt, and may also constitute fresh oppression against Margarita in her capacity as a preferred shareholder of Xela.

7. There are indeed parallels between the transactions described in the First Report and the oppressive conduct that led to the Oppression Judgment. The Oppression Judgment arose from Margarita's status as a director and minority shareholder of Tropic International Limited

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[1] See *Castillo v. Xela Enterprises Ltd.*, 2015 ONSC 6671 ("**Oppression Judgment**") at ¶4-7 (**Tab 1**); Affidavit of Juan Arturo Gutierrez sworn June 17, 2011 at ¶19 (excerpt at **Tab 2**).
[2] Affidavit of Juan Arturo Gutierrez sworn June 17, 2011 at ¶20 (excerpt at **Tab 2**).

("**Tropic**"). Tropic was a family company, like Xela, but it stood apart from the Xela Group because it was directly owned by the "next generation" (Juan and Margarita holding 44.44% each of the common shares, and Arturo holding an 11.11% "tie breaker" interest).[3]

8. Beginning in 2010, Juan and Arturo pressured Margarita to accept a buy-out of her Tropic common shares. As Margarita resisted and sought more information to justify the valuation, Juan and Arturo engaged in a variety of tactics ultimately found to be oppressive to Margarita—even as an application for relief from oppression had already been commenced against them. These tactics included false bookkeeping to transfer value away from Tropic and into the Xela Group. In particular, Juan and Arturo retroactively recorded a liability payable to a Xela Group company on the books of Tropic, as a "tactic to harm the interests of Margarita".[4]

9. Now, with Margarita having a right to be paid from the assets of Xela, value has once again been shuffled away, this time into the ARTCARM Trust, under suspicious circumstances. These transactions—the first of which apparently occurred in early 2016, shortly after the Oppression Judgment was issued in October 2015—are deserving of intense scrutiny. From Margarita's perspective, the stakes are high: the transactions endanger not only her ability to collect on the judgment debt (more than $4 million) but also her ability to collect on her preference shares (an additional $14 million).

[3] Oppression Judgment at ¶12-13 (**Tab 1**).
[4] Oppression Judgment at ¶56-67 (**Tab 1**).

C. Additional Red Flags

10. The magnitude of the transactions at issue and of their consequences for Xela's creditors is sufficient on its own to justify careful scrutiny of the transactions described in the First Report. However, there are also several additional red flags that give cause for suspicion:

(a) The First Report notes the absence of evidence showing that Arturo advanced US$9 million to EAI. Such a loan makes little commercial sense given that EAI was the holding company for profit-generating subsidiaries (Arven and BDT), which had loaned collectively US$100 million of dollars *to* Lisa to finance the Avicola Litigation.[5] It is also notable that Arturo's estate was required to disclose its assets to Margarita in the context of judgment debtor examinations, and did not identify any outstanding loan balance owing from EAI.[6]

(b) When Juan was examined as a judgment debtor in August 2018, he was evasive when asked to confirm Xela's organizational chart and the identity of its subsidiaries.[7] Margarita did not become aware of the transactions described in the First Report until Xela, in response to Margarita's receivership motion, filed an

[5] First Report at s. 4.1, ¶4. As referenced in the First Report, the Avicola Litigation is a blanket term for more than 100 lawsuits in multiple jurisdictions, which have been ongoing for more than twenty years. The litigation is principally between Lisa, as the direct owner of Avicola Group shares, and Arturo's relatives in Guatemala who own the remaining two-thirds of the Avicola Group.

[6] Exhibit "D" to the Examination of Carmen Gutierrez as Executor of the Estate of Juan Arturo Gutierrez held on July 26, 2017 (**Tab 3**). See also First Report at s. 4.1, ¶5-6, describing Xela's contention that a $2.5 million loan remains owing from EAI to Arturo.

[7] Transcript of the Examination of Juan Gutierrez held on August 30, 2018 at qq. 809-815 (excerpt at **Tab 4**).

application for protection under the *Companies' Creditors Arrangement Act*, and was obliged to disclose this information.

(c) The one-page Assignment Agreement by which Lisa surrenders 70% of the Avicola Litigation proceeds to BDT (*after* repayment of the loan balance and reimbursement of costs) is signed on behalf of Xela by Calvin Shields. Mr. Shields, who is 88-years old, is a member of the Xela board of directors, who also held the title of President of Lisa.[8] But when Mr. Shields was examined as a representative of Xela in November 2018, he professed that he had not attended a board meeting in over two years, had "seen no relevant documents", was "retired basically", did not have "any responsibility of what's going on now", and as far he knew, "nothing has transpired".[9] This is incongruent with Lisa having signed away 70% of the proceeds of the Avicola Litigation.

(d) Juan advised the Receiver that he has "no information concerning the Trust or the details of the EAI Transaction".[10] Based on Mr. Shields' evidence, this is implausible. Xela has no remaining officers or employees other than Juan, who has been the President and CEO of Xela for many years. If there was anyone who knew about status or activities of Xela's subsidiaries, Mr. Shields indicated it would be Juan.[11]

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[8] Appendix "E" to the First Report.
[9] Transcript of the Examination of Calvin Shields held on November 27, 2018 at qq. 309-310, 321, 330 and 387-391 (excerpts at **Tab 5**).
[10] First Report at s. 4.1, ¶8.
[11] Transcript of the Examination of Calvin Shields held on November 27, 2018 at qq. 370-372, 414-416 and 421-423 (excerpts at **Tab 5**).

D. Interpretation of Paragraph 4 of the Receivership Order

11. Margarita supports the Receiver's position regarding paragraph 4 of the Receivership Order, and in particular that paragraph 4 does not preclude the court from exercising a supervisory role over transactions affecting the Xela Group's single most valuable remaining asset (*i.e.*, its interest in the Avicola Litigation). The intention of paragraph 4 was to prevent the Receiver from taking unilateral steps (analogous to those specified in subparagraphs (a) to (d)) that would be disruptive to a potential resolution of the Avicola Litigation. A plain reading of paragraph 4 of the Receivership Order does not limit the role of the court, and certainly does not entitle Xela, a company operating in receivership, to settle the Avicola Litigation without the prior approval of the court.

12. It would pervert the core function of these receivership proceedings to interpret paragraph 4 as meaning that Xela is immune from court supervision in respect of its management of the Xela Group's single most valuable asset. The non-arm length's transactions discussed above further demonstrate and emphasize the importance of court supervision, as does the fact that Xela has taken a position objecting to court supervision—if the Avicola Litigation was going to be settled on reasonable terms, then court approval would not be an obstacle.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2019.

Per

BENNETT JONES LLP

TAB 1

2015 ONSC 6671
Ontario Superior Court of Justice [Commercial List]

Castillo v. Xela Enterprises Ltd.

2015 CarswellOnt 16479, 2015 ONSC 6671, 259 A.C.W.S. (3d) 679

Margarita Castillo, Applicant and Xela Enterprises Ltd., Tropic International Limited, Fresh Quest, Inc., 696096 Alberta Ltd., Juan Guillermo Gutierrez and Juan Arturo Gutierrez, Respondents

Newbould J.

Heard: June 4, 2015; June 5, 2015
Judgment: October 28, 2015
Docket: CV-11-9062-00CL

Counsel: Jeffery S. Leon, Jason W.J. Woycheshyn, for Applicant
Joseph Groia, Kevin Richard, Martin Mendelzon, for Respondents

Subject: Corporate and Commercial

APPLICATION by applicant for oppression remedy seeking order requiring respondents to buy shares in company.

***Newbould J.*:**

1 The applicant moves for an order requiring the respondents [1] to buy her shares in Tropic International Limited ("Tropic"). The respondents take the position that the issues raised by the applicant should proceed to trial and that in any event there is no basis for the relief sought by the applicant.

2 For the reasons that follow, I hold that the issues can and should be determined without the necessity of a trial and that the applicant is entitled to have her shares in Tropic bought out at a price of $4.25 million.

3 In this oppression application, Margarita Castillo ("Margarita") alleges that her father Juan Arturo Gutiérrez ("Arturo") and her brother Juan Guillermo Gutiérrez ("Juan") have conducted the business and affairs of certain family companies in a manner that has been oppressive. The close family ties that once existed are no more. Margarita alleges that for several years there has been a complete breakdown in the relationship among shareholders and a state of animosity exists that precludes all reasonable hope of reconciliation. Accordingly, Margarita seeks to have the respondents buy her shares of Tropic at fair value.

4 Arturo was one of three children of Juan Bautista Gutiérrez who emigrated from Spain to Guatemala in 1911 and created a flour milling and animal feed business. By 1965, Arturo was running the family business. Arturo and his two siblings incorporated Avicola Villalobos for the purpose of engaging in poultry production. Avicola expanded to become a fully-integrated set of companies engaged in the production of poultry. In addition to its poultry business, the Gutiérrez family also developed a highly successful chain of chicken restaurants. Ownership of the Avicola Group was divided equally among Arturo and his brother and sister.

5 In 1974, after his brother and his sister's husband died, their roles in the family business were assumed by their respective children (the Bosch and Gutiérrez Mayorga families, also known as the "Cousins"). Arturo says that from the time one of the Bosch sons, Juan Bosch, became involved in the business, tensions grew in the family and in the operation of the business. Because of that and the societal strife and civil war, Arturo decided to leave Guatemala. After Arturo emigrated from Guatemala, the Cousins were left with two-thirds ownership of the Avicola Group and Arturo retained his one-third stake in the business.

Arturo has been in litigation in various jurisdictions for many years against the Cousins whom he alleges have defrauded him out of his interest in the Avicola Group.

6 Arturo emigrated to Canada in 1984. His son Juan and his daughter Margarita and her husband Ricardo Castillo emigrated to Canada at about the same time.

Xela Enterprises Ltd.

7 Arturo formed Xela Enterprises Ltd. as the corporation holding his business interests. It is an Ontario corporation. Initially, he gifted to each of Juan and Margarita 75 Class B non-voting shares of Xela, while he retained control. He also hired his son, Juan, and Margarita's husband Ricardo to work for Xela. In 1996 Arturo effected an estate freeze in Xela under which Margarita and Juan exchanged their common stock in Xela for preferred shares with a fixed value to each of approximately $14 million that would be redeemable at Arturo's death. The common stock was put into a Gutiérrez family trust in which Arturo retains voting control and whose beneficiaries are his grandchildren.

Tropic International Limited

8 Ricardo and Charles Graham, a business colleague of Ricardo's, founded Tropic in 1989. Tropic's business was initially focused on the sale and distribution of ginger and cassava root. Ricardo and Mr. Graham were the founding shareholders of Tropic and its officers and directors. Margarita was also a founding officer and director. Arturo and Juan were not shareholders, officers or directors, and had no role in operating Tropic.

9 As part of Tropic's initial business plan, Xela's indirect subsidiary Mayacrops S.A. grew the ginger and cassava root to be sold and distributed by Tropic. However, Mayacrops could not successfully grow cassava, and absorbed its own losses. Tropic did not seek alternate suppliers, and from approximately 1990 to 1994 the company was inactive. Ricardo acquired Mr. Graham's Tropic shares, leaving Ricardo as the sole shareholder of Tropic during this period.

10 In 1994, Tropic assumed ownership of Northern Produce Inc., a business primarily involved in importing melons into North America from Central America. Northern Produce Inc. was incorporated as a Tropic subsidiary. Northern Produce Inc. initially functioned as one of four partners in a Florida general partnership, with Xela having 55% and the other three partners 15% each. Xela acquired the interests of the other partners on July 1, 2003 at which time Northern Produce Inc. changed its name to Fresh Quest, Inc. Since 2003, Fresh Quest's business has involved importing and distributing fruit products throughout the United States and Canada. Farm operating companies in Guatemala and Honduras owned by Xela sell fruit directly to Fresh Quest.

11 Fresh Quest has never existed as a separate entity apart from Tropic and is the only asset of Tropic. Northern Produce Inc. was placed in Tropic at the time of its formation. Arturo claims however that it was a mistake and an oversight to place Northern Produce Inc. in Tropic, an entity owned entirely by Ricardo, rather than in a company owned by Xela. He states that when he realized that Tropic was not a Xela subsidiary, he asked Ricardo to increase the capital so that some of the shares could be transferred to Juan and himself "in order to keep family peace".

12 Ricardo agreed to do so and the resulting share structure of Tropic was that Ricardo and Juan each held 44.44% of the shares and Arturo held 11.11%. Arturo said on his cross-examination that in this way everyone was participating, that he did not expect any problems but that he held his 11.11% to use as a tie breaker just in case there was a problem. Ricardo puts a different slant on the transfer of shares to Juan. He says that that it was Arturo's desire to allow "the next generation" to develop businesses of its own. Arturo and Juan became shareholders of Tropic on October 17, 1994, and directors on Jan 5, 1995. Neither Arturo nor Juan paid anything for their Tropic shares.

13 In 2007 Ricardo stopped working for Xela and he resigned from the Xela board in April 2007. Margarita took his seat on the Xela board. Each side blames the other for Ricardo leaving the Xela business. At that time, Arturo asked Ricardo to transfer his Tropic shares to Xela for nothing. Ricardo refused to do so, believing that his shares in Tropic were worth several millions. In the end at the urging of Arturo and Juan, Ricardo's shares of Tropic were transferred to his wife Margarita for $1.00 on April 2, 2008. On the same day Ricardo resigned from the board of Xela and was replaced by Margarita.

14 While there are statements in the material filed on behalf of the respondents that Margarita held her shares in Tropic for the benefit of Xela, Arturo admitted on his cross-examination that the shares legally belong to Margarita and that she is entitled to whatever benefit flows from them. Juan admitted the same on his cross-examination.

15 While Margarita was a shareholder and director of Tropic, she was given financial information from the CFO of Xela that had been prepared by the comptroller of Xela that her shares of Tropic were worth US$20,111,500. This information was required by Margarita who had been asked to sign a personal guarantee of Tropic's line of credit with its banker. Juan's shares in Tropic were valued as well at this figure of US$20,111,500.

16 Despite Tropic's separate legal identity, the respondents have historically treated Tropic and Fresh Quest like any other Xela subsidiary. As CEO, the day-to-day management of both Tropic and Fresh Quest are controlled by Juan. Before 2012, Fresh Quest matters were only addressed at Xela board meetings. Tropic never held its own board meetings until after Margarita was removed as a director and officer. Margarita started attending Xela board meetings in 2007 and acquiesced in the practice of determining Fresh Quest matters at Xela board meetings.

Removal of Margarita from the Xela and Tropic boards

17 The Xela companies have been embroiled in a bitter dispute with the Cousins regarding Arturo's one third interest in the Avicola Group. The interest in the Avicola Group is held by a Xela subsidiary named Lisa S.A. A judgment was obtained against the Cousins in Bermuda in which it was found that the Cousins had conspired to defraud Lisa through the misappropriation of corporate profits. The Cousins have responded with a series of lawsuits in Guatemala seeking to expropriate Lisa's interest in the Avicola Group.

18 Arturo and Juan accuse Margarita of siding with the Cousins and of scuppering settlement discussions in 2009. Much of their accusations are based on speculation. Margarita denies the accusations. Be that as it may, it is clear that the accusations against Margarita led to her removal from the boards of both Xela and Tropic.

19 The friction between Margarita, Juan and Arturo escalated in April 2010, when Juan and Arturo, through their accounting advisors, proposed that Tropic should be sold to Xela at a total valuation of $8 million. Margarita's shares were accordingly valued at $3.52 million. This valuation shocked Margarita, after being told that her Tropic shares were valued at approximately US$20 million.

20 Margarita received no explanation for this $8 million valuation of Tropic. On April 7, 2010, Arturo phoned Margarita to try to get her to agree to the transaction. Arturo refused to give Margarita any information on the valuation of Tropic or provide her with any of Tropic's or Fresh Quest's financial statements. She says that he threatened that if she did not agree to sell her shares, her monthly draws from Xela would stop.[2] When she refused, Arturo demanded she resign as a director of Xela by April 15, 2010.

21 On April 28, 2010, Arturo asked Margarita why she had not resigned from Xela's board. When Margarita told him that she had no desire to resign, her father demanded that she not attend the Xela board meeting scheduled for the next day, April 29, 2010. Margarita emailed the Xela Board members to explain that she would not be attending the April 29th meeting as she had not received any prior notice of the board meeting or any of the standard materials provided to board members.

22 On April 30, 2010, Margarita received an email which attached a resolution of the voting shareholder of Xela, being Arturo, dated April 28, 2010 which removed her as a director of Xela and was effective immediately. Despite her entitlement as director to receive notice of and to attend this meeting of shareholders, she received no notice of any such meeting. In May, 2010, Arturo caused Xela to stop making monthly payments to Margarita.

23 The special resolution removing Margarita as a Xela director made no reference to Tropic. Margarita discovered that she had been removed as an officer of Tropic when her lawyers conducted a corporate search. A search of Tropic as of May

17, 2010 showed that she was still an officer and director. A search conducted as of June 8, 2010 showed that Margarita was still a director, but no longer an officer.

24 In late December 2010 the respondents' lawyer advised Margarita that he believed she had been removed as a director of Tropic around the same time she was removed from the Xela board; i.e. in April, some eight months earlier. In Arturo's supplemental affidavit, dated August 11, 2011, he revealed for the first time that there had been a "Special Meeting of the Shareholders of Tropic" on April 29, 2010, at which Margarita was removed as a director of Tropic.

25 While there is a dispute as to whether Margarita had been given meaningful notice of the Xela board meeting scheduled for April 29, 2010, there is no doubt that she was not given notice of a shareholder's meeting of Tropic for that day.

26 On his cross-examination, Arturo admitted that he made a conscious decision not to tell Margarita at the time that she had been removed from the board of Tropic. He said that "I didn't want her to receive two bad news together", meaning news of her removal not just from the Xela board but also from the Tropic board.

Request for financial information

27 On June 18, 2010, Margarita sent to Arturo, Juan and Mr. Karol, the CFO of Xela, a request for financial statements and information regarding Tropic and Fresh Quest. In her email enclosing the request, she stated "Now that the growing season is over, as a director and 45% shareholder of Tropic, I would like to have some information to help me understand Tropic's current financial position." She did not yet know that she had been removed as a director of Tropic on April 29, 2010.

28 On June 25, 2010, the respondents' lawyer sent a letter to Margarita dated June 22, 2010, on instructions from Juan, stating that Xela's board had unanimously approved an offer to purchase Tropic shares at a valuation of $8 million at its meeting on April 29, 2010. The purchase price was to be preference shares in Xela redeemable with periodic payments over five years. The letter stated that the offer would only be open to Margarita for 10 days, and that it included a 40% premium. It said that Arturo and Juan had each accepted Xela's offer. The letter ignored Margarita's request for information made three days before and did not explain the $8 million valuation of Tropic. Margarita was out of the country at the time in South Africa and says that Arturo was aware of it, having being told on June 19, 2010. Arturo said he could not remember whether he knew at the time that Margarita was out of the country.

29 On June 28, 2010 Margarita's lawyers replied and asked that the deadline for the offer be extended until Margarita had a reasonable opportunity to review the requested financial information. They stated that she could not be expected to make an informed decision on the offer in the absence of financial information to support the valuation and the alleged 40% premium.

30 On July 1, 2010, the respondents' lawyer responded to Margarita's request for financial information by acknowledging that Margarita was certainly entitled to view the financial information of Tropic, but not entitled to view the financial information relating to Fresh Quest, because she was not a shareholder of Fresh Quest. The respondents' lawyer further stated that the basis of the respondents' Tropic valuation was proprietary to Xela.

31 The position taken by the respondents, therefore, was that although Tropic was a holding company and its valuation depended entirely on the valuation of its subsidiary Fresh Quest, Margarita as a shareholder of Tropic was not entitled to financial information about Fresh Quest as she was not a shareholder or director of that company.

32 In August 2010, Margarita retained Farley Cohen of Cohen Hamilton Steger & Co. Inc. to help value her shares in Tropic. The respondents at first refused to produce any documents to Mr. Cohen. On May 13, 2011, after a failed without prejudice process in which a confidentiality agreement was signed and some information was provided to Mr. Cohen, the parties consented to an order requiring information to be provided to Mr. Cohen as requested by Mr. Cohen. A further order was made on June 13, 2011 and again on August 17, 2011 requiring the respondents to deliver the documents requested by Mr. Cohen no later than August 30, 2011. On December 3, 2013 the requested documents had not all been delivered, as the respondents took the position that Mr. Cohen did not need, or should not see, all that he had requested, and on that day a further order was made that the documents were to be delivered by January 17, 2014.

Pressure to sign a guarantee of Fresh Quest line of credit

33 Although Margarita was denied access to financial information regarding Fresh Quest because she was merely a Tropic shareholder, the respondents demanded that Margarita continue to personally guarantee Fresh Quest's line of credit with the International Finance Bank.

34 On December 9, 2010, the respondents' lawyer sent to Margarita an unconditional guarantee unlimited as to amount to support Fresh Quest's line of credit. She was asked to sign it as soon as possible and told that time was of the essence. Additional documentation enclosed with the letter revealed that the Tropic board had passed a resolution on September 1, 2010, a little more than three months earlier, guaranteeing the liabilities and obligations of Fresh Quest to International Finance Bank for approximately US$7 million, and that Juan and Arturo had signed personal guarantees on the same day. Both pieces of information came as a surprise to Margarita, who still believed that she was a director of Tropic, having been told so in the respondents' lawyer's letter to her of July 10, 2010, and who did not know of the September directors' resolution. No explanation was given why they waited three months to send the requested guarantee to Margarita.

35 Margarita's lawyers wrote in reply to this request on December 22, 2010 to the respondents' lawyer and relayed Margarita's concerns and additional requests for information were made. In reply to those concerns, on December 22, 2010, the respondents' lawyer disclosed Margarita's removal from the Tropic Board on April 29, 2010 at the time she was removed as a director of Xela. The requests for financial information were not answered. The respondents' lawyer said that the bank wanted Margarita's guarantee, that time was critical and that it would be harmful to the best interests of Tropic and Fresh Quest for Margarita to refuse.

36 On the following day, December 23, 2010, Margarita's lawyers wrote back to the respondents' lawyer and explained that it was not reasonable to ask her to sign the guarantee of Fresh Quest's line of credit and put all of her assets as risk without having been properly informed. They stated that notwithstanding this, and out of a concern for the best interests of the entities involved, and the representation that the entities would suffer irreparable harm if she did not sign the guarantee, Margarita conditionally agreed to sign the personal guarantee. Among the conditions were that Margarita be provided with information showing that the bank still required a guarantee from her, that she be provided with any supporting financial documents given to the bank in connection with renewing the line of credit, that she be indemnified by Arturo, Juan and Xela for any liability she might have under the guarantee and that arrangements be made with the bank so that Margarita would not be forced to sign a guarantee in the future.

37 On January 6, 2011 the respondents' lawyer replied. No further financial information was provided. The letter said that if Margarita wanted an indemnity from Xela, it would make Xela effectively the sole guarantor of Tropic (no explanation of the guarantees already given by Arturo and Juan was given) and that Xela would indemnity her only if given further shares in Tropic. That would of course have diluted Margarita's shareholding in Tropic. Shortly after this letter was received, Margarita commenced this application on January 18, 2011.

Events post-application

38 By letter dated April 1, 2011, the respondents' lawyer Kevin Sherkin advised Margarita that the Fresh Quest line of credit had been terminated by the International Finance Bank, alleging that the termination was the result of Margarita telling the bank of her litigation. Margarita denies telling the bank that. The letter stated that Margarita was now required within seven business days to personally advance 44% of the $7 million, being the amount of the line of credit before it was said to have been terminated by the bank.

39 The letter from Mr. Sherkin also stated that because of the position of Margarita, there would be a restatement to the financial statements of Tropic:

> In the event that the funds are not confirmed to be committed and delivered within seven business days, you will leave us with no alternative but to consider a new strategy for the company.

> Also be advised that given the nature of how the Tropic Group of Companies was treated by Xela, and given your client's position, the accounting for the group is presently being restated to reflect all of the proper expenses on Tropic's accounts and books in order to give the true picture of it's [sic] profitability. This is going to result in a sizeable deficit for the group.

40 On April 12, 2011, the same day the statement of claim was issued, a Xela wholly-owned subsidiary, Xela International Inc. posted two journal entries effective May 31, 2010 that caused the shareholders' equity of Tropic to be decreased from approximately $580,000 to approximately a negative $3.5 million.

41 On April 8, 2011, Margarita's lawyers requested that she be provided with information about the "new strategy for the company" referred to in the April 1 letter.

42 A reply dated April 15, 2011 from the respondents' lawyer ignored the request. It stated that Margarita had destroyed a longstanding relationship with the bank. It enclosed a statement of claim issued on April 12, 2011 by Xela, Arturo, Juan and other corporations against Margarita, her husband Ricardo and 10 other defendants associated with the Cousins claiming damages of $400 million. It also claimed a further $4,350,000 against Margarita and Ricardo for breach of their fiduciary duties as directors of Xela which had caused damage to Xela. No allegations were pleaded that Margarita or Ricardo breached any duties owing to Tropic or Fresh Quest and those companies were not parties to the action.

43 The credit facility for Fresh Quest with the International Finance Bank was still in place when Mr. Korol, the CFO of Xela, was cross-examined on July 12, 2012. There is no evidence that it has since been terminated by the bank.

Issues

1. Should Tropic and Xela issues be tried together?

44 In my decision of July 3, 2014 I did not accede to a request of the respondents that the application of Margarita regarding Tropic should go to trial to be dealt together with her application regarding Xela. Rather, because it was not clear at that stage whether the Tropic and Xela issues in the application could or could not be severed, I permitted the applicant to proceed with her application relating to Tropic and permitted the respondents to contend on the hearing of the application that the Tropic and Xela issues could not be severed and should proceed together to trial.

45 Having heard the evidence, I am satisfied that the applicant's claim that she is entitled to an order requiring her Tropic shares to be purchased can be dealt with separately from her claim for relief relating to her interest in Xela. There are a number of reasons for this.

46 The allegations made by the respondents against Margarita regarding her alleged damage caused to Xela include no allegations that her alleged activity caused any damage to Tropic or to Fresh Quest. The statement of claim against her and the Cousins for in excess of $400,000 million includes no such allegations and Tropic and Fresh Quest are not referred to. The evidence of the alleged conduct referred to on behalf of the respondents on the hearing of this application, apart from being nearly entirely speculation and innuendo based on no cogent evidence, all relate to the claims that Margarita has been assisting the Cousins who have deprived Arturo of his one-third interest in the Avicola Group, which is entirely separate from Tropic and Fresh Quest

47 On his cross-examination, Arturo stated that what Margarita did with the Cousins was not relevant to her claim with respect to her shares in Tropic as the two things were separate matters. On his cross-examination, Juan stated that information regarding Tropic was irrelevant to what the Cousins were interested in, being Xela information. I accept that the two issues are separate. What Margarita is alleged to have done with the Cousins to harm Arturo's interest in the Avicola Group cannot affect her rights as a shareholder of Tropic.

48 I further find that it is possible on the evidence to determine if there has been conduct on the part of the respondents towards Margarita that gives rise to a right of relief and if so what that relief should be.

2. Has there been oppressive conduct towards Margarita regarding her position in Tropic?

49 The proper approach in dealing with a claim for oppression is first to look to the concept of reasonable expectations and, if a breach of a reasonable expectation is established, to then consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 248 of the OBCA. See *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.) at paras. 56 and 68.

50 Relationships in closely held family businesses and the practices carried out can be of importance in considering the reasonable expectations of a family member who is a complainant and cause a court to look at more than simply legal rights. In *BCE*, the Court stated:

> **75** Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).
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> **76** Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

51 Practices and expectations can change over time. Where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice. See *BCE* at para. 77.

52 There are a number of matters that lead to the conclusion that there has been oppressive conduct that has at least unfairly disregarded Margarita's interest in Tropic as a shareholder and director and in some cases has been coercive and abusive. It has been borne out of a family dispute that has nothing to do with Tropic, but rather involves a dispute of Arturo with the Cousins regarding his one-third interest in the Avicola Group.

53 Until she was secretly removed as a director of Tropic in April, 2010, Margarita had been a director since the formation of Tropic in 1989. When shares in Tropic were acquired in late 2004 by Arturo and Juan, who became directors of Tropic in January 2005, Margarita continued as a director of Tropic. She had an expectation that she would remain a director. This was no accident. When Arturo and the family emigrated to Canada in 1984, Arturo told the family that everybody was going to be treated equally. She, like Juan, acquired the same percentage of shareholding in Xela. When the shareholding of Tropic was restructured in 2004 and Ricardo no longer was its shareholder, Margarita acquired the same 44% shareholding as Juan, and she continued as a director with Juan. Her continuing as a director of Tropic was a reasonable expectation. Her removal as a director for reasons unrelated to Tropic was oppressive.

54 There can be no doubt that Margarita was entitled to expect honesty from her father Arturo and her brother Juan in their dealings with her interest in Tropic. Her secret removal as a director at a special meeting of shareholders in April 2010 of which she had no notice and then not being told for some eight months later after a number of prodding questions from her lawyer about the financial affairs of Tropic and Fresh Quest completely disregarded her interests as a director of Tropic. Arturo's explanation that it was bad enough for Margarita to be removed as a director of Xela at the same time and that he did not want to give her two pieces of bad news at once was no excuse, even if true. He admitted that he did deliberately did not tell her of her removal as a director of Tropic.

55 Although Fresh Quest was a wholly owned subsidiary of Tropic since the commencement of the Fresh Quest business, Tropic and Fresh Quest were treated like any other Xela subsidiary. As CEO, the day-to-day management of both Tropic and Fresh Quest were controlled by Juan and Fresh Quest matters were only addressed at Xela board meetings. Tropic held no board meetings. As long as Margarita was a director of Xela, she had access to financial information regarding Fresh Quest. That stopped when she was removed as a director of Xela by Arturo on April 28, 2010. It had negative consequences so far as Margarita was concerned.

56 The way in which Margarita was treated in connection with the attempt to get her to sell her shares of Tropic to Xela was coercive and abusive. It is no answer that she resisted and refused to sell her shares in the circumstances in which she was denied financial information to assess their value. In particular:

(a) The Xela offer to acquire the Tropic shares was approved at an April 29, 2010 Xela board meeting which Margarita was told not to attend. Margarita had no knowledge that the offer was going to be made. She had talked to Arturo in early April when he tried to get her to sell her shares based on a valuation of $8 million for Tropic, but he had refused to give her any information on the valuation of Tropic. She understandably had an interest in understanding the basis of the $8 million valuation for the whole company as she had been told by the Xela financial people two years earlier that her Tropic shares alone were worth approximately $20 million.

(b) When Margarita refused to accede to her father's demand that she sell her Tropic shares to Xela, his threats to remove her as a director of Xela and to stop monthly payments from Xela to her were abusive and intended to coerce her into selling her Tropic shares to Xela. The refusal to give her financial information supporting the $8 million valuation disregarded her rights and expectations and was part of the coercive tactic being employed by her father to get her to sell her Tropic shares.

(c) After Margarita through her lawyers requested financial information about Tropic and Fresh Quest on June 18, 2010, Margarita was told by letter sent on June 25, 2010 of Xela's offer that had been approved on April 29, 2010 and that Arturo and Juan had already accepted it. Margarita was entitled to know of the offer at the same time and no explanation was given why she was only told of the offer two months after it was made. The deadline of 10 days she was given to accept the offer without any reply to the request for financial information was part of the coercive attempt to get her to sell her Tropic shares.

(d) The respondents argue that Margarita had sufficient information to value Tropic. I do not accept that. Margarita did not have up to date information. More importantly, no one could have expected Margarita to be able to value the company. She had been a homemaker since the birth of her first child. She did have financial information as a director of Xela but she was removed as a director in April, 2010 and had not received the board package of material with up to date financial information. As well, Mr. Korol, the CFO of Xela, had done a rough calculation of value of Tropic but evidently this was not considered sufficient because Xela commissioned a valuation of a Michael Badham that Arturo said on cross-examination was seen by Arturo and Juan by the time of the April, 2010 Xela board meeting. If Arturo, Juan and Mr. Korol thought a valuation by an accredited appraiser was necessary, it does not lie in their mouth to say that Margarita should have been able to determine the value of Tropic when she was given 10 days in late June, 2010 to respond to the offer made to her. Margarita had a reasonable expectation that she would be provided with the financial information regarding Tropic that Arturo, Juan and Xela had, including the valuation obtained by Xela. For the respondents to take the position that its valuation of the Tropic shares was propriety to Xela ignores completely the relationship of the parties and Margarita's reasonable expectations of being properly informed.

(e) As well, Farley Cohen, the valuer retained by Margarita to provide her with a value of Tropic, felt unable to value Tropic without information from Xela about the business of Fresh Quest, and several court orders were required before the requested information was disclosed in 2014. Mr. Cohen is a senior respected business valuer and if he needed more information, it cannot be seriously said that Margarita had enough information.

(f) The position taken by the respondents' lawyer on July 1, 2010 in response to Margarita's further request for financial information that Margarita was entitled to view the financial information of Tropic, but not entitled to view the financial

information relating to Fresh Quest because she was not a director or shareholder of Fresh Quest completely disregarded her rights and expectations as a shareholder of Tropic (and from what she had been told as a continuing director of Tropic). The only business of Tropic was the Fresh Quest business and the argument that she was not entitled to financial information of Fresh Quest because she was not a director or shareholder of Fresh Quest was a contrivance and ignored the relationships and availability of financial information to Margarita that had occurred in the family until then. It was part of the abusive treatment of Margarita.

57 The attempts by the respondents to get Margarita to sign a guarantee of the Fresh Quest line of credit with its banker was also unequal treatment and abusive. It was completely inconsistent with the position taken that she was not entitled to financial information regarding Fresh Quest because she was not a director or shareholder of Fresh Quest. Pressure was put on Margarita to sign the guarantee quickly yet the line of credit had been approved three months earlier when Arturo and Juan signed guarantees. No explanation was given for the three month delay. When Margarita through her lawyers offered to sign the guarantee if certain conditions were agreed to, including a request that Xela indemnify Margarita, the response on behalf of the respondents was part of the abusive treatment. The conditions requested by Margarita were not unreasonable. Margarita was no longer a director of Xela or being provided with financial information regarding Fresh Quest. The response that Xela would need more shares of Tropic if Margarita were provided with an indemnity was a tactic to pressure her to sign the guarantee. It would have diluted her interest in Tropic at a time when the respondents were attempting to get her to sell her Tropic shares to Xela.

58 Actions taken on behalf of the respondents after this application was commenced continued the abusive treatment of Margarita and unfairly disregarded her interests. The demand in April, 2011 that she personally advance 44% of $7 million said to be needed by Fresh Quest because of the termination of the line of credit by Fresh Quest's bank was inconsistent with the position taken that she was not entitled to financial information of Fresh Quest because she was not a director or shareholder of Fresh Quest. The demand that she provide the funds within seven business days, failing which the respondents would be left with no alternative but to consider a new strategy for the company, was a tactic to pressure her. The fact that Fresh Quest's bank continues to lend to Fresh Quest, as acknowledged by Mr. Korol on his cross-examination, raises doubts that Margarita was required to advance the money as demanded.

59 The statement of April 1, 2011 made by Mr. Sherkin on behalf of the respondents to Margarita's lawyers that "given your client's position, the accounting for the group is presenting being restated to reflect all of the proper expenses on Tropic's accounts and books in order to give the true picture of its profitability", was a litigation tactic and no way to treat Margarita as a shareholder of Tropic. It was an attempt to load Tropic with debt and negatively affect Tropic's balance sheet and the value of her shares in Tropic that she was asking the Court to order to be bought out at a fair valuation. Even if the restatement of Tropic's books was a legitimate exercise, which I do not think was the case, it meant that for several years before the restatement the books of Tropic that were kept by Xela accounting personnel were not true statements. As a shareholder and director of Tropic, Margarita had a reasonable expectation that Xela, which was operating the Fresh Quest business, would accurately record the financial affairs of the business. Those books were not adjusted to put debt on the books of Tropic when Arturo and Juan had earlier sold their Tropic shares to Xela, and the change to the books now that Margarita was asking to be bought out at a fair price was oppressive conduct.

60 The restatement of the books of Tropic was made by a journal entry on April 12, 2011, the same date that the action against the Cousins and Margarita for in excess of $400 million was started. The impact of the adjustment was that the shareholders' equity of Tropic went from approximately $580,000 as at May 31, 2009 to approximately a negative $3.5 million as at May 31, 2010

61 XGL was a logistics transportation business operated at a loss by Xela International Inc., a subsidiary of Xela, from 2007 to 2010. Mr. Soriano of Campbell Valuation Partners Limited, the expert valuer retained by the respondents in this application, said in his report that management advised that it was always the case that XGL was a business division of Fresh Quest. Mr. Soriano said on his cross-examination that management advised him that while the XGL business was being run, the losses were reported in Xela because it was too complicated with banking relationships to set it up within Tropic at that time. What he said he was advised by management is of course hearsay and the respondents put forward no direct evidence that XGL was a business division of Fresh Quest or as to why the losses were booked in Xela when they were incurred.

62 It makes little sense that a business such as XGL being run by Xela International would have a right to book its losses in any other company. The losses were carried on the financial statements of Xela which were audited, as were the financial statements of Fresh Quest. There was no suggestion of a mistake when Arturo and Juan accepted the Xela offer to acquire their shares of Tropic. The corporate organization of Xela was sophisticated with sophisticated financial people and advisers. Tropic and Fresh Quest were separate companies with separate financial statements. If it was the case that the losses were intended all along to be losses of Tropic or Fresh Quest, it means that Arturo and Juan, both directors of Tropic, failed in their duty as directors to see that the financial statements properly recorded the financial results of Tropic. They were the management of Xela that managed the business of Fresh Quest, for which Xela charged Fresh Quest $80,000 per month and a sales commission on Canadian sales made by Fresh Quest fixed at US$12,500 per month. Margarita had a reasonable expectation that Arturo and Juan would properly and timely record the financial results of Tropic and Fresh Quest. [3]

63 Mr. Korol advised Mr. Cohen that at the time of the restatement when the XGL losses were transferred from the books of Xela International, Xela's management decided that the losses should be borne by Fresh Quest. However, according to what Mr. Korol told Mr. Cohen, the losses could not be booked in Fresh Quest's financial statements due to certain of Fresh Quest's banking financial covenants, resulting in the losses being booked in Tropic instead. That statement of course is hearsay. What was in evidence was from the cross-examination of Mr. Korol in which he stated that Fresh Quest sent $11,000 to a Xela-related company "to pay some perks to a couple of XGL executives". Mr. Korol pointed out that this amount was not expensed in Fresh Quest but was booked as an intercompany loan payable from Xela to Fresh Quest. There would have been no need for this intercompany loan payable from Xela to Fresh Quest if XGL was a division of Fresh Quest. That transaction was completely inconsistent with the position now being taken by the respondents.

64 Another aspect of booking the losses in Tropic rather than Fresh Quest was that there would have been significant tax benefits from booking the losses in Fresh Quest as it would have reduced the tax payable by Fresh Quest. Tropic was not an operating company and had no income against which the losses could have been written off for tax purposes. A higher profit for Fresh Quest would make its valuation higher and thus result in a higher equity value of Tropic.

65 Mr. Cohen points out as well another negative effect of transferring the losses to Tropic rather than to Fresh Quest. Under the transfer pricing agreement made by Fresh Quest with Xela and three Xela subsidiaries, 80% of the Fresh Quest residual profits are allocated to Latin American Procurement Ltd ("LAP"), a Barbadian company which provides technical services to farms owned by Xela in Central America. By recording the amounts in Tropic, rather than Fresh Quest directly, management did not accurately reflect the impact on Fresh Quest. As Fresh Quest's residual profits are allocated 80%/20% between LAP and Fresh Quest, Fresh Quest would have effectively allocated 80% of the expenses, or approximately $3.29 million, to LAP via a reduction through its residual profit allocation. Higher expenses of LAP, a Xela subsidiary, would have reduced its profits. I find it much more likely that this motivated Arturo and Juan to cause the XGL losses to be booked in Tropic rather than Fresh Quest, not a suggested bank covenant problem for which there was no evidence.

66 I cannot find that the transfer of XGL losses from the books of Xela International to the books of Tropic was a legitimate step taken in good faith. In the circumstances, I find it was a tactic to harm the interests of Margarita who had started an application to be paid the fair value of her shares in Tropic, and was oppresive.

67 In my view of the evidence, and I so find, the actions of the respondents other than 696096 Alberta Ltd. (Margarita's holding company) as discussed were individually and cumulatively oppressive. The actions were not taken in good faith and were abusive. They were oppressive to Margarita's interests as a director and shareholder of Tropic.

3. Appropriate relief

68 Section 248 of the OBCA gives wide scope to fashion a remedy once oppressive conduct has been established. Subsection 248(2) provides that a court may make an order to rectify the matters complained of. Subsection 248(3) provides that a court may make any order it thinks fit including the power to direct a corporation or any other person to purchase securities of a security holder.

69 I do not accept the arguments made on behalf of the respondents that Margarita had no reasonable expectation, by gift from Arturo or otherwise, that she was to have a stake in Tropic separate and apart from what she had in Xela shares. Both Arturo and Juan have admitted that Margarita is the owner of her Tropic shares and entitled to what they are worth. The offer from Xela to Margarita to buy her shares in Tropic belies any notion that she has no reasonable expectation to the value of those shares. Moreover, neither Arturo nor Juan paid anything for their shares of Tropic and yet they sold them to Xela. What would be a gift to Margarita if her shares were bought by Xela would be just as much a gift to Arturo and Juan. Juan has the same preferred shares in Xela as does Margarita.

70 In my view, the appropriate relief under section 248(3) of the OBCA is to order that Margarita's Tropic shares be bought by the Arturo, Juan and Xela or any one or more of them at fair value. It is clear that the relationship of these respondents with Margarita has completely broken down and that Margarita cannot expect to be treated properly as a shareholder of Tropic. The past actions of Arturo and Juan make that very clear. Their past threats or actions are an indication of how they are likely to deal with Margarita. Leaving her as a shareholder of Tropic would make her vulnerable to Arturo and Juan who have indicated a complete antipathy towards her. Such potential vulnerability could include diluting her shareholding in Tropic by the issuance of more shares to them or Xela, transferring liabilities to Tropic or Fresh Quest or changing the business relationships of Fresh Quest in a way that would lessen its revenues. As well, it is clear that Arturo and Juan do not want Margarita to continue to own her shares in Tropic. Their steps to try to force her to sell her shares to Xela make that clear.

71 Reinstating Margarita as a director of Tropic would do little. The gravamen of Margarita's complaint is the way she was treated in an attempt to get her to sell her shares of Tropic to Xela without being provided appropriate financial information and the way she was treated when pressure was put on her to sign a guarantee of the Fresh Quest line of credit and then to personally put up cash for Fresh Quest without proper financial disclosure of Fresh Quest. Margarita cannot expect to be treated fairly as a director of Tropic by Arturo or Juan. Taking the position that the financial affairs of Fresh Quest are not open to her as she is not a director or shareholder of Fresh Quest belies any suggestion that she will be treated fairly.

4. Fair Value of Margarita's Tropic shares

72 Fair value is not the same as fair market value, but rather is a value based on principles of equity. In *Glass v. 618717 Ontario Inc.*, 2012 ONSC 535 (Ont. S.C.J. [Commercial List]) at para. 246 Brown J. (as he then was) quoted with approval:

> 5. Market value "is the highest price expressed in money obtainable in an open and unrestricted market between knowledgeable, prudent, and willing parties dealing at arm's length, who are fully informed and under no compulsion to transact". However, "market value" is not equivalent to "fair value", although ... fair market value can be an important part of the fair value determinate depending on the circumstances.
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> 6. Fair value is a value that is "just and equitable" - one which provides "adequate compensation (indemnity), consistent with the requirements of justice and equity." One important implication of the distinction between market and fair value is that, in general, no minority discount can be applied in determining "fair value" ...

73 The issue therefor is the fair value of Margarita's Tropic shares that is to be paid to her.

74 Each side engaged an expert valuer to provide a market value evaluation of the Tropic shares. Mr. Farley Cohen was retained by Margarita. Mr. Errol Soriano was retained by the respondents. Both are highly qualified expert valuers. Both prepared an en bloc fair market valuation of Tropic using a valuation date of December 31, 2010.

75 As in many cases, Mr. Cohen and Mr. Soriano have reached quite different conclusions. Mr. Cohen estimates the fair market value of Margarita's Tropic shares as between $5.2 and $5.6 million. Mr. Soriano estimates the fair market value of Margarita's shares as $0.9 million or $2.6 million depending on whether the XGL adjustment transferring liabilities to Tropic should be recognized.

76 Margarita contends that it would be inequitable for Arturo and Juan to assert a lesser valuation of Tropic shares than the $8 million en bloc valuation that was the basis for the Xela offer in April 2010 that they directed Xela to make and which they accepted. If not for the respondents' oppressive conduct in withholding information from her, Margarita could have taken advantage of that same offer whether or not it reflected fair value at the time. The respondents say that Margarita refused the offer and initiated expensive and lengthy proceedings and that it would be inequitable to permit a party to reject an offer, put everyone through the expense of a lengthy legal proceeding to try to get more, and then ask that she at least be able to accept the offer made and rejected 5 years ago. This position of the respondents ignores their failure to provide Margarita with appropriate financial information which I have held unfairly disregarded her interests. It also ignores the evidence of Arturo given on his cross-examination that he would still have Xela buy Margarita's shares at the price offered in 2010 if she were willing to do so.

77 One consideration is that the $8 million offer was to be paid in preference shares of Xela that were non-dividend bearing and on their face redeemable with annual payments over five years. One may consider that if the $8 million figure was payable over five years, the shares were worth less than $8 million on the date of the offer because of the time value of money. However, Xela had the option at its sole discretion to redeem the shares at any time. As a practical matter Arturo had the right to pay himself out immediately as he controlled the voting shares of Xela. As he and Juan were working hand in glove together, Juan could have been expected to do the same if he wished. I would pay little attention, therefore, to the fact that the redemption payments could have been deferred. They had a right to have them made immediately.

78 Mr. Cohen in his report stated that as the sale transaction from Arturo and Juan to Xela of their Tropic shares involved non-arm's length parties, he did not rely on it for the purposes of his fair market value analysis. That may be, but it does not prevent the use of the amount paid to Arturo and Juan for their Tropic shares from being considered in what is a fair and just amount to be paid to Margarita for her Tropic shares. In my view, it would be inequitable in the circumstances of this case for Margarita to receive less than her pro rate share of the $8 million figure used to acquire the Tropic shares of Arturo and Juan. Arturo and Juan refused to provide Margarita with financial information, and had they, Margarita would have been in a better position to asses and perhaps accept the offer, in which case she would have had use of the money for the five years that have occurred since the offer. The amount that would be paid to Margarita for her 44% interest in Tropic using the $8 million valuation would be $3,520,000.

79 Mr. Cohen used an adjusted book value technique to value Tropic as it was a holding company with its main asset being 100% of Fresh Quest. He used a capitalized earnings technique to value Fresh Quest based on a multiple of earnings before interest, taxes, depreciation and amortization ("EBITDA"). He arrived at an en bloc fair market value of the shares of Fresh Quest that ranged from $11.2 million to $12 million and the adjusted book value of Tropic that ranged from $11.8 million to $12.6 million resulting in the fair market value of Margarita's 44% interest in Tropic to be in a range of $5.2 million to $5.6 million.

80 Mr. Soriano valued the fair market value of Fresh Quest's shares by using a capitalized cash flow approach. He concluded that the value of Fresh Quest's equity is in the range of $2.6 million to $4.4 million, which is less than the net book value of Fresh Quest at the valuation date of $5.6 million. He therefore concluded that whereas Fresh Quest is capable of continuing to operate, the value of the business does not include commercial goodwill. He adopted the net book value of $5.6 million as the equity value of Fresh Quest. He concluded that the book value of Tropic's investment in Fresh Quest should be increased from $100 to $5.6 million. He then derived two figures for the fair market value of the Tropic shares. One figure was $2.1 million on the assumption that the XGL adjustment would be taken into account and the other figure was $5.8 million on the assumption that the XGL adjustment would not be taken into account. The resulting fair market value of Margarita's shares in Tropic therefore was either $900,000 or $2.6 million.

81 It must be recognized that while the role of an expert valuer is to provide guidance to the Court as to what fair market value is, in the end it is ultimately a matter of judgment for the Court to determine what the fair value should be. A trial judge is entitled to accept or reject the evidence of an expert witness in whole or in part. A trial judge need not accept the valuation of the experts, and is entitled to make his or her own calculations to arrive at a valuation. See *Towne Cinema Theatres Ltd. v. R.*, [1985] 1 S.C.R. 494 (S.C.C.), *Connor v. R.*, [1979] C.T.C. 365, 79 D.T.C. 5256 (Fed. C.A.) and *Muscillo v. Bulk Transfer Systems Inc.*, 2010 ONSC 490 (Ont. S.C.J. [Commercial List]).

82 In *Brant Investments Ltd. v. KeepRite Inc.* (1987), 60 O.R. (2d) 737 (Ont. H.C.); aff'd (1991), 3 O.R. (3d) 289 (Ont. C.A.), the trial judge Anderson J. discussed the method to be used in considering the expert valuations. He put it well in stating:

> 112 Three expert witnesses were called to give valuation evidence: Campbell for KeepRite, and Louden and Wise for the dissenting shareholders. All three used basically the same technique: capitalization of earnings to determine value, with subsidiary use of other techniques as a check on the result. It was common ground among them that valuation is not an exact science. Some judicial and other learned opinion to this effect is accumulated by Greenberg J. and set out at p. 223 et seq. of *Domglas*, *supra*. While due application of the methodical approaches adopted by the experts is useful, it is dependent upon factors which are entirely a matter of judgment and the end result is an opinion, not a precise solution arrived at by precise methods utilizing only known and constant factors. That this is the nature of valuation is well illustrated in the end results arrived at by the three experts who testified. Leaving aside any question of a premium for the inclusion of synergies, the results arrived at were: Campbell $9; Louden $22; and Wise $28.
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> 113 The court is to be guided by the evidence given by the experts but is not bound by their opinions. In arriving at my valuation I do not propose to go through the valuation exercise followed by the experts, substituting my own conclusions as to the basic ingredients for theirs. The wide disparity exhibited by them in the application of their technique does not inspire me with any confidence in the result which I would achieve as an amateur in its application. Consequently, I do not intend to examine the fine details of the exercise gone through by each of the experts, although I recognize that for them they were essential to the integrity of the process. Rather, I intend to focus on the most important elements and to express my preferences and conclusions with respect to those. In the light of those preferences and conclusions, and the other evidence available to me, I have arrived at a valuation.

83 Brown J. in *Glass*, *supra*, adopted the admonition that judges should exercise caution in attempting to mix and match portions of competing expert reports and thereby cast themselves in the role of performing their own valuation, with support from Anderson J. in *Brant Investments* as quoted.

84 The experts differed on several assumptions, the most important as I see it being the use of a transfer price agreement made by Fresh Quest with related companies, the applicability of the XGL transfer of losses to Tropic undertaken in June, 2010 and an appropriate capitalization rate to be used. I will deal with these.

(1) Transfer pricing

85 Fresh Quest is a Florida corporation and is part of a vertically integrated group of companies ("Fresh Quest Group") that grows, packages and ships fresh produce (mostly cantaloupes and honeydew melons) and vegetables (i.e. okra) from Central America to North America and Europe. The Fresh Quest Group is one of the largest melon producers in the world and has offices in Florida, Canada, Guatemala, Honduras and Panama. The Group is comprised of Nobleza and Excosur, being farming companies in Guatemala and Honduras, Latin American Procurement Ltd. ("LAP"), a Barbadian company which provides technical services to the Guatemalan and Honduran farming companies and Fresh Quest, which purchases product from the Guatemalan and Honduran farming companies and then sells and distributes this product to its customers in the US, Canada and Europe.

86 Fresh Quest was a party to a transfer pricing agreement ("TPA") with Xela, LAP and the farming companies made on July 1, 2004. The TPA originally provided for the following:

> (a) Fresh Quest was entitled to earn a 2.5% profit margin on internal revenues and share any profit above this level with LAP on a 20%/80% basis, respectively;
>
> (b) LAP was to receive 80% of profits in excess of the 2.5% profit margin earned by Fresh Quest, plus a 10% mark-up on administrative fees for technical services provided to the Farms. LAP provided an indemnity to Fresh Quest for any losses that resulted from adverse events (i.e. spoilage, quality issues, and natural disasters) and was to reimburse the Farms for any spoilage and/or crop losses that result from research and development activities undertaken by LAP;

(c) The Farms were to sell product to Fresh Quest at a price that provides a 15% gross margin to Fresh Quest on sales of product bought from the Farms; and,

(d) Xela provides administrative and management support to Fresh Quest at its cost and receives a sales commission of 2% of Canadian sales made by Fresh Quest. Commencing July 1, 2005, Xela charged Fresh Quest USD $80,000 per month for administrative and management support services provided by it and the commission received by Xela was to be USD $12,500 per month.

87 The TPA was made after a review of the transfer pricing policies of the Fresh Quest Group and Xela by Ceteris Canada Ltd, a Canadian company that provides transfer pricing services. Transfer pricing is important to tax authorities who are interested in seeing that multinational enterprises pay their proper tax in the jurisdictions in which they carry on business. Ceteris identified three potential options which would result in Fresh Quest retaining a portion, none or all of its residual profits. Xela management decided on having 80% of the Fresh Quest profits paid to LAP in Barbados under the TPA.

88 Mr. Soriano, with some relatively minor adjustments, accepted the income generated by Fresh Quest under the TPA in carrying out his capitalized cash flow valuation of Fresh Quest. He concluded that the methodology employed to establish the terms of the TPA was consistent with the definition of fair market value employed in his report. On this basis, he concluded that to the extent the TPA terms were reflected in the prices charged for the transactions, no adjustment was required in his calculation of the fair market value of Fresh Quest's equity using a capitalized cash flow approach.

89 Mr. Cohen chose not to rely on the income derived by Fresh Quest under the TPA. His view was that the related party transactions resulting from the TPA between the Fresh Quest Group and Xela would not necessarily occur if Fresh Quest was operated by a third party. He noted that in exchange for the profit share split between Fresh Quest and LAP, LAP provided only an indemnity to Fresh Quest in respect of any losses that were created by events that adversely impact revenues due to quality issues, spoilage and natural disasters. There has been only one payment in respect of this indemnity, which was limited to approximately 50% of the estimated total loss, or $540,000, whereas LAP had received $10.228 million as a result of receiving 80% of the profits earned by Fresh Quest after its 2.5% profit margin.

90 Mr. Cohen noted also that the TPA is brief and does not include any terms in respect of an assignment of the agreement, a sale of one of the Fresh Quest Group's companies independent of the other entities, termination terms or an expiry date. In light of this, it was his understanding from Ceteris that, in the event there was to be a sale of Fresh Quest on a stand-alone basis, it is highly likely that the terms of the TPA would be amended in order to reflect the current risks and responsibilities, and thereby maximize the value of Fresh Quest. For example, a purchaser of Fresh Quest would likely not want to provide 80% of the company's residual profit to LAP, which Mr. Cohen said effectively transferred the majority of the Fresh Quest profits to LAP, given that LAP is reimbursed by the Farms for providing administrative services to them.

91 The respondents point to the fact that the TPA apparently received the blessing of CRA in Canada and the IRS in the United States. Regarding the CRA, Fresh Quest is a Florida company that pays no taxes in Canada, and therefore CRA would be interested only in what Fresh Quest was paying Xela for the administrative services provided by Xela to Fresh Quest. It would not be interested in what Fresh Quest, a Florida company, was paying LAP, a Barbadian company.

92 Exactly what the IRS in the U.S. looked at regarding the TPA is not known. Mr. Cohen asked for, but was not given, any documentation regarding the IRS audit. The fact that the IRS may have blessed the TPA a few years prior to the effective date of the valuations does not in itself mean that the TPA represented the fair market value in that it was the highest amount that Fresh Quest would necessarily receive for its distribution role. Ceteris had pointed out at the time it did its study in 2005 that there were several different amounts that Fresh Quest could receive that would satisfy the market value standards used by the tax authorities.

93 Without going into all the details of the two experts regarding this transfer pricing issue, I agree with the basic position of Mr. Cohen. The issue is what a third party buyer would pay for the Fresh Quest business and what income it thought it could achieve. If the buyer did not want to pay 80% of the residual profits of Fresh Quest to LAP, a Barbadian company that provided

administrative services to the farm companies in Honduras and Guatamela, the U.S. tax authorities would have no difficulty if Fresh Quest started retaining more of its income rather than paying it to LAP. The fact that Fresh Quest paid out in excess of $10 million to LAP and got only one payment of $500,000 for spoiled produce on one occasion supports the notion accepted by Mr. Cohen that the TPA would likely not be continued by a third party purchaser. The fact that Xela management was able to transfer 80% of the residual profits of Fresh Quest to LAP, a subsidiary of Xela in Barbados that would not be subject to U.S. tax, presumably because it was tax advantageous to Xela, does not in itself mean that the TPA reflected fair market value, which is defined to be the highest value that an arm's length party would pay.

94 As a result of his conclusions about the TPA, Mr. Cohen applied a profit margin to Fresh Quest's historical average annual revenues derived from looking at operating profit margins for fresh fruit and vegetable wholesalers. Mr. Soriano did not comment on the source used by Mr. Cohen. I see no reason to question Mr. Cohen's imputed profit margins he used in arriving at the earnings to be capitalized.

(2) XGL adjustment

95 The XGL adjustment made on April 12, 2011 by journal entry effective May 31, 2010 was made after the effective date of the appraisals of December 31, 2010 that both valuers have used. To accept this adjustment as Mr. Soriano did was to impermissibly accept and rely on hindsight evidence of something that occurred after the effective date of the valuation. It is a basic principle of valuation that a valuer may not rely on hindsight evidence post the valuation date and that events that were not known as of the valuation date are not relevant to determination of fair value on the valuation date. See *Glass*, *supra* at para. 246. Thus, even if the XGL adjustment was otherwise proper, it should not have been taken into account in arriving at a fair market valuation effective some months before the adjustment was made and known.

96 So far as a fair value is concerned, it would be very unfair to Margarita to recognize the XGL adjustment. It was made only because Margarita had brought an application to be paid a fair value for her Tropic shares and it was intended to decrease the value of Tropic and thus the amount that might be ordered to be paid to her. The adjustment had not been made before Arturo and Juan had agreed to sell their Tropic shares to Xela, or before the valuation by Mr. Badham was made that preceded that sale. The adjustment was not made in good faith, as I have held, and was oppresive. It should not be reflected in the amount to be paid to Margarita for her Tropic shares.

97 The XGL adjustment to the Tropic balance that was made by journal entries on April 12, 2011 backdated to May 31, 2010 was as follows:

	Debit	***Credit***
	$	**$**
Retained Earnings	4,117,479	
Due from Xela Enterprises (Asset)		464,855
Due to Xela International (Liability)		3,652,624

98 These journal entries:

(a) Transferred historical expenses incurred by Xela International Inc. in the unsuccessful launch of the XGL operations, totaling approximately $3.65 million to Tropic; and,

(b) Recorded a further adjustment of approximately $465,000, which represented a break fee which was paid to exit the lease agreement, which was entered into for facilities of the XGL operations.

99 Mr. Cohen points out that in Mr. Soriano's report he has omitted adding back the break fee portion of the entry, totaling approximately $465,000, which was also booked in Tropic. Mr. Cohen is of the opinion that if the adjustments were inappropriate, Mr. Soriano has underestimated the value of Tropic with respect to the XGL adjustment by at least a further $465,000 over and above Mr. Soriano's figure of $3.65 million allocated to Tropic in the XGL adjustment. Mr. Soriano put the

fair market value of Margarita's Tropic shares at $900,000 including the XGL adjustment and at $2.6 million excluding the XGL adjustment. This difference of $1.5 million would increase by 44% of $465,000 or $200,640 on Mr. Cohen's analysis for an upward adjustment of Mr. Soriano's valuation of Margarita's Tropic shares by approximately $1.7 million on the assumption that the XGL adjustment should not be recognized.

(3) Capitalization rate

100 Mr. Cohen used a multiple of ranging from 5 to 6 times to apply to the maintainable EBITDA for Fresh Quest that he concluded was in a range of $1.7 to $2.2 million. This multiple was based on his review of multiple transactions involving grocery wholesalers and food wholesale/distribution companies and on offers made between 2004 and 2007 for the entire Fresh Quest Group. Mr. Soriano used what he called a buildup method, or a weighted average cost of capital method, in determining his multiple.

101 Mr. Soriano was critical in the use by Mr. Cohen of multiples derived from offers made some three years prior to the valuation date and before the financial crisis of 2008 to acquire the entire Fresh Quest Group as he viewed the risks to Fresh Quest alone higher than the risks to the Fresh Quest Group as a whole. He concluded that the appropriate multiple would be less than 5 to 6 times and he adopted capitalization rates based on multiples of 3.4 and 4.7 to be applied to his maintainable EBITDA of Fresh Quest.

102 There is something in the criticism of Mr. Soriano to the multiples used by Mr. Cohen. The entire Fresh Quest Group for which the offers were made was different from just Fresh Quest itself and the comparable transactions used by Mr. Cohen could be looked at as being not entirely comparable. If the multiples of 3.4 and 4.7 derived by Mr. Soriano were to be applied to the maintainable EBITDA of Fresh Quest as adopted by Mr. Cohen, that would result in an en bloc fair market value of Tropic of $8.7 to $9.5 million, or $3.83 to $4.1 million for Margarita's 44% interest.

(4) Minority discount

103 In argument, Mr. Groia for the respondents contended that there should be a minority discount to be applied to Margarita's Tropic shares. I do not agree. The respondents rely on a statement of Blair J.A. in *Mason v. Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 (Ont. C.A.) at para. 48 that in order to justify the deduction of a minority discount in the valuation of minority shares, the conduct of a minority shareholder must be of such a grave character that he or she deserved to be excluded from the company. I cannot find the conduct of Margarita to fit within such language at all. Even if the dislike of Arturo and Juan towards Margarita was valid, which on the evidence before me is speculative at best as to alleged "wrongdoing", it is in relation to the dispute with the cousins and as admitted by Arturo, has nothing to do with Tropic.

104 Normally in a family situation in which one side is required to buy out the other at a fair value, no minority discount is ordered. In this case Xela offered to purchase the Tropic shares held by Arturo, a minority shareholder, without applying a minority discount, and did the same with Juan, both of whom accepted the offer. I would not apply a minority discount to derive a fair value for Margarita's Tropic shares.

(5) Conclusion of fair value

105 There are other nuances of the valuations that I do not propose to delve into, such as the appropriate deduction for indebtedness of Fresh Quest and what should be included in redundant assets and whether Fresh Quest could be considered to have goodwill, which in part at least involves the appropriate use of the TPS.

106 In the end, and adopting the approach of Anderson J. in Brant, I have concluded that in all of the circumstances, the fair value of Margarita's 44% of Tropic is $4.25 million. Arturo, Juan and Xela are jointly ordered to pay Margarita this amount.

Costs

107 Margarita is entitled to her costs. If these cannot be agreed, brief written submissions along with a proper cost outline may be made within 10 days and brief reply submissions may be made by the respondents within a further 10 days.

Application allowed.

Footnotes

1 The order sought is against all respondents other than the respondent 696096 Alberta Ltd., which is Margarita's company to hold her preference shares in Xela.

2 Margarita states that her father took a portion of his wealth and gifted it to her and her brothers Luis and Juan. They were then required to loan this money back to the corporate predecessor of Xela. For the following 25 years, until May 2010, she received monthly "draws" which were characterized as shareholder loan repayments. In April, 2010 the Xela tax advisor was told that the shareholder advances and paid-up capital of the Xela group at the individual shareholder level had been exhausted, and he recommended an alternative. Juan and Arturo say the draws were simply gifts.

3 The lease of the property used by XGL was signed by Fresh Quest. Why that was done was not the subject of any direct evidence from the respondents. In his report, Mr. Soriano said that "management" advised that Fresh Quest signed the lease because XGL was a business division of Fresh Quest. That is hearsay that was not proven.

TAB 2

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

MARGARITA CASTILLO

Applicant

- and –

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and JUAN ARTURO GUTIERREZ

Respondents

AFFIDAVIT OF JUAN ARTURO GUTIERREZ
(Sworn on June 17, 2011)

I, JUAN ARTURO GUTIERREZ, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Chairman of the Board of Xela Enterprises, Ltd. ("Xela"). I also hold various corporate positions in affiliated corporate entities of Xela. I was born on May 6, 1930 in San Cristobal, Guatemala. In Quetzaltenango, Guatemala, I attended primary school at the German School, 1937 to 1942, and then attended the Public Business School from 1942 through 1948, when I graduated as a bookkeeper. From 1948 to 1950, I attended Loyola College in Montreal, Canada, studying business. In 1984, I emigrated to Canada, where I currently reside.

for them, never invested a one penny in Tropic and when she received them from her husband, it was only in exchange for Xela's transfer to him of a business that is easily worth $2 million dollars. Furthermore, Margarita was not pressured to sell her shares in Tropic because the offer made by Xela was open to all shareholders under the same terms. We also agreed to provide her and her advisors information they requested after we mutually signed a confidentiality agreement. We even provided her a copy of the Badham valuation that Xela commissioned in order to have an independent third party view as to the valuation. Xela's offer, incidentally, extended to all shareholders, was about 30% more than the valuation indicated by a third party. On this basis, I felt it was more than fair. We kept the offer open to Margarita for most of the summer of 2010 and gave her every opportunity to tender her shares after advisors reviewed with her the information requested, but she refused. This was being done even though she really didn't have a beneficial interest in those shares but the transaction would allow her and the other shareholders to receive payments from Xela on a beneficial tax basis. In general terms, the shareholders of Tropic would receive preferred shares of Xela which were redeemable in monthly instalments. I was willing to provide her another gift at the time.

IV. Xela's 1996 Corporate Restructuring

19. Xela was established by transferring my shares in a Panamanian holding company called Gabinvest, S.A. in exchange for promissory notes. At the time, I gave my children Preferred Class B shares in Xela which were non-voting. The intention from inception was for my children to enjoy the growth of their shares in Xela but I would have voting control and final decision-making. I made additional subscriptions for Class B Preferred shares were made for each of my children and by 1996, each of my children had been given 6,999 Preferred Class B shares in Xela. The caso of these shares to me for each of my children was about $454,935.00.

These shares did not have redemption or retraction rights. When my son, Luis Arturo, decided to leave Canada with his family, to move to the United States, he demanded that we purchase his shares, even though there was no such obligation to do so. This resulted in family discord because not only was their no right of redemption, but the intent of the corporate structure was to allow the next generation to enjoy future growth, with my retaining control of Xela. After all, Xela was founded with the companies which I built and developed and the shares of my children were gifts in the sense that none of my children bought or paid for their shares nor can they claim to have earned them with their hard work over the years, with the exception of Juan Guillermo is works as Xela's CEO on a full-time basis. We finally reached a resolution with my son, Luis Arturo, and his shares were purchased. This happened at a most inopportune time and frankly, it made me full vulnerable. Learning from this unfortunate experience, I then sought the advice of legal corporate counsel to restructure the shareholdings in Xela so that such a dispute could never arise again and that I would have full control.

20. In 1996, therefore, my legal counsel proposed an "estate freeze." As part of that structure, the value of the Preferred Class B shares of Xela would be fixed but to insure that neither of my children could force a redemption of their shares prior to my death, their shares in Xela were sold to Alberta holding companies in exchange for common shares of the Alberta Companies, so that the equity would be owned by them, but preferred shares in the Alberta Companies were issued to me giving me voting control. As a result, until my death, I would be in control of the Preferred Class B shares, now owned by the Alberta Companies, and upon my death, my preferred shares in the Alberta Companies convert to non-voting stock, resulting in each of my children gaining control of their respective Alberta holding company which would allow them to seek redemption of their Preferred Class B shares. I thus retained all voting

control and control of all decisions. This is what I wanted and my children knew that to be the case. I annexed hereto and mark as **Exhibit "B" and "C" respectively** the complete closing documents for this transaction as it relates to 696096 Alberta, Inc. (Margarita's Alberta Holding Company) and the Certificate of Independent Legal Advice of Margarita Castillo. My daughter, Margarita, and my son, Juan Guillermo, were represented by separate legal counsel and they knowingly accepted the proposed corporate restructuring.

21. With respect to Margarita's contention that she had to pay taxes in Canada for income attributed to her because of a "management error," I never said such a thing to Margarita. She is referring to a tax liability in Canada for interest income involving a shareholder loan. Interest income on a loan is taxable in Canada. No one in Xela management can help that or change that.

22. I love my children very much. I have always treated them fairly, giving them what they needed and looking after them as best as I could. Margarita's Application, which seeks to force a premature purchase of her Preferred Shares in Xela, when the 1996 corporate restructuring was designed to prevent just that, is disheartening especially when you consider that the pretext for such a lawsuit involves referring to me as someone who has lost his mind and even worse, someone who is involved in improper and wrongful corporate conduct. I never imagined Margarita would be capable of such betrayal all because of greed. As painful as it is, I am actually relieved that this matter will be resolved in a Canadian Court. I say this because despite my country's progress since the 1996 Peace Accords, political and monetary influence still can have sizable influence in Guatemala's judicial system, as we have been witness to such

TAB 3

EXHIBIT No. D
EXAMINATION OF Carmen Gutierrez PRIMARY ESTATE

Castillo VS Xiela ESTATE OF J. ARTURO GUTIERREZ

DATE July 26, 2017
NETWORK COURT REPORTING

Statement of Original Assets valued as at June 24, 2016 (Date of Death)

PERSONAL PROPERTY

TD Canada Trust 2518 Bayview Avenue Toronto, Ontario M2L 1A9 Account 3372-7156174 ($3,263.71 U.S.*)	$	4,227.16
American Express, credit balance Credit card # 3735 092349 61000		884.84
Automobiles:		
1. 2013 mercedes-Benz SL550R Convertible SS VIN WDDJK7DA6DF012028 (leased - value shown is equity to date of death)		30,000.00
2. 2010 Mercedes-Benz S550V 4Matic 4D VIN WDDNG8GB7AA318061		30,000.00
3. 2003 Mercedes-Benz SL500R Convertible SS VIN WDBSK75F93F049657		8,000.00
4. 1994 Mercedes-Benz SL500R Convertible SS VIN WDBFA67E2RF096895		5,000.00
5. 1927 Buick Coupe VIN 1946303		20,000.00
6. 1999 Mercedes-Benz S500 VIN WD8GA51G7XA410544 ($8,000 U.S.*)		10,361.60
7. 1997 Aston-Martin DB7 VIN SCFAA4129VK201109 ($25,000.00 U.S.*)		32,380.00
8. 1972 Mercedes-Benz 350 SL VIN 10702310002578		2,500.00
TOTAL PERSONAL PROPERTY		**$ 143,353.60**
TOTAL VALUE OF ESTATE		**$ 143,353.60**
Estate Administration Tax:		**$ 1,660.00**

E. & O.E.

/rvs

APPROVED LIST OF ASSETS THIS 19 DAY OF December, 2016

Carmen S. Gutierrez - Estate Trustee

* U.S. exchange rate - $1.2952

TAB 4

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

- and -

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Defendants

This is the Continued Examination in Aid of Execution of JUAN GUILLERMO GUTIERREZ, personally and on behalf of the corporate Defendants herein, taken at the offices of Network Reporting & Mediation, 100 King Street West, Suite 3600, Toronto, Ontario, on the 30th day of August, 2018.

A P P E A R A N C E S:

WILLIAM BORTOLIN Solicitor for the Plaintiff

and you know that.

So I'm not answering any more. I told you, I already answered the question when you read the transcript you're going to see I answered the question the first time you asked it. So, I'm not going to say anything else, because you're trying to make me say things so find me in a little contradiction somewhere; I'm not going to give you that pleasure, because the answer is only one and I already gave it. So I'm not saying anything else about this.

--- REFUSAL

807. Q. You haven't answered my question, but I'll take it as a refusal. We referred ---

A. It's not a refusal, so I object to that term because I answered the question.

808. Q. We'll agree to disagree. We referred several times to subsidiaries ---

A. So make sure that my objection is on the record.

809. Q. She records everything. We referred to the subsidiaries several times. You refused to acknowledge when I put in front of you an organizational chart of the subsidiaries. I can list them one-by-one without reference to the chart, but I would like it to be quicker and easier if we can just

agree to refer to this chart as setting out Xela subsidiaries. We agree to that?

A. Not agree to that, because I don't know what you're trying to do.

810. Q. I'm trying to make the record clear, because ---

A. I know what you're trying to do; you're trying to trick me into something. Okay?

811. Q. Stop interrupting me when I'm asking questions, please?

A. No. Stop trying to trick me with your silly little manoeuvers, you know? I'm not going to answer questions about the company -- you ask me about me personally. And I don't have shares in any of those companies, okay?

I don't even have common shares of Xela, if that's your question, I only have ---

812. Q. It wasn't a question.

A. Okay? So I don't have any assets. You took my house, my cars, my cottage from me; you left my whole family on the street now. Destroyed our company, the business that I was running with all these fake allegations and insults, you know other allegations that we were laundering money? All these things that your lawyers, your law firm supported my

sister doing. And you got paid with money that was taken from one of the subsidiaries of this company, and that's how you got paid and maybe you don't even know that, but Jeffrey Leon certainly did. And so did Jason Woycheshyn, you know? If I miss-pronounce his name I apologize, because I don't know how to pronounce it.

But the truth of the matter is they know exactly how this case evolved; it's a fabrication and you were successful. You were successful because my lawyers were not successful in persuading the judge to give us a fair trial.

We never had a trial. I never had an opportunity to be in front of a judge and tell my side of the story, nor did my dad. My dad will never have that chance now; he's dead two years' now.

813. Q. My question, which I was trying to finish, was that we referred several times to Xela subsidiaries. I am referring mainly to the organizational chart that was marked as Exhibit L to your last examination, and you will refuse to acknowledge the document, so I'll mark it for what's called identification, which means you're not admitting anything about it, as Exhibit A.

--- EXHIBIT NO. A: Organizational Chart regarding Xela

and subsidiaries.

BY MR. BORTOLIN:

814. Q. And I am referring to an answer to undertaking received from Calvin Shields entitled "Directors Xela and Subsidiaries", which I will mark for identification as Exhibit B.

--- EXHIBIT NO. B: Directors Xela and Subsidiaries.

BY MR. BORTOLIN:

815. Q. And my question is, when you referred to subsidiaries what companies are you talking about? You don't have to refer to these documents if you don't want to; when you referred to Xela subsidiaries, what companies are you talking about?

A. I'm not going to answer any more questions about the company. I'm here to respond about my assets, about my personal situation, about my ability to pay this judgment. That's what I'm here for, not to answer questions about the companies.

816. Q. Right, and that is exactly what my question is directed towards; your ability to get assets ---

A. I don't have any shares of those companies.

817. Q. Stop interrupting me while I'm asking these questions.

TAB 5

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARGARITA CASTILLO

Plaintiff

- and -

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, as Executor of the Estate of Juan Arturo Gutierrez

Defendants

This is the Continued Examination in Aid of Execution of CALVIN SHIELDS, via videoconference, personally herein, taken at the offices of Network Reporting & Mediation, 100 King Street West, Suite 3600, Toronto, Ontario, on the 27th day of November, 2018.

A P P E A R A N C E S:

WILLIAM A. BORTOLIN Solicitor for the Plaintiff

JUAN J. RODRIGUEZ Solicitor for Calvin Shields
(via videoconference)

--- UPON COMMENCING AT 11:10 A.M.

CALVIN SHIELDS; Re-Affirmed

CONTINUED EXAMINATION BY MR. BORTOLIN:

305. Q. My name is Will Bortolin. I am counsel for Margarita Castillo. You will be familiar with my colleague, Jason Woycheshyn who examined you last July. And you are Calvin Shields. Correct?

A. Yes.

306. Q. Do you still live at 4118 Oakmont Court in Vero Beach, Florida?

A. Yes.

307. Q. And are you now 86 years' old?

A. 87.

308. Q. A recent birthday?

A. February, yes.

309. Q. And you are still a member of the Board of Directors of Xela Enterprises, Ltd.?

A. Well, I suppose technically. We haven't had a meeting in over two years, a long time, and so I don't know what we do. We don't have a company much anymore.

310. Q. But you understand that you're testifying as a representative of Xela, as you were last year?

A. Yes, I haven't learned anything since

last year though.

311. Q. Okay. But I have. Much of what I'll be doing today will be following up on a lot of answers that we got after your last examination, and you have some of the stacks of paper in front of you. But, we got a lot of answers afterwards and so I'll be following up on some of those.

Xela Enterprises Ltd. I'll just refer to as Xela today. And there are some other affiliates that I'll identify more precisely as we come across them. If you don't understand a question as I'm asking it, don't hesitate to let me know. And if ever you need a break again, don't hesitate to let me know?

A. Thank you.

312. Q. You're represented by a lawyer today; and that's Juan J. Rodriguez?

A. Yes.

313. Q. And is it the same as your previous examination that he's representing you in a personal capacity?

A. Yes.

314. Q. Did you review the transcript from your last examination held on July 27, 2017?

A. I don't remember doing it. It was basically just saying I didn't know -- there wasn't

much to review, I'm afraid.

315. Q. So I take it from that then that you didn't see anything in the transcript that you recall thinking that you needed to correct?

A. Oh, heavens no. I don't even remember what the transcript was like -- when I saw it.

316. Q. Were you involved though in following up to figure out some of the answers to the questions you didn't know at the time?

A. I remember asking Mark Korol, telling him that I'd used him as a reference and that he was going to be getting questions from you people. And, that was basically the only thing I remember.

317. Q. And we received several answers and your lawyer had some of them beside him today. Would you have reviewed those before they were sent over to us?

A. Not sure what you're talking about.

318. Q. So there were several questions that we asked at your last exam that you didn't know, and either undertook to answer or declined to answer, but later the court directed you to answer, or directed Xela to answer with you as Xela's representative?

A. I still support it, I guess.

319. Q. And my question was just whether the

answers that we've received and you can take it from me that we've received answers, but the question was whether you reviewed those before they were sent to us?

A. I assume I have, but I don't remember.

320. Q. As far as you know those answers were correct?

A. Yes.

321. Q. And, are there any new relevant documents that you brought with you today?

A. I have no documents at all. I have seen no relevant documents.

322. Q. So my focus today, as it was on your last exam, is going to be on the assets, liabilities, income and spending of Xela, including its subsidiaries. And I'm not going to repeat questions or try not to repeat questions that you've already been asked, except to confirm that they're up to date or bring them up to date if they're not.

And most of what I'll do today, as I mentioned earlier, is follow up on some of the answers and documents that we received after your last examination. Mr. Woycheshyn addressed with you at your last exam that there was an outstanding judgment against Xela and others, which including the costs

award totalled a little over $5 million.

I will represent to you that there are some of the other judgment debtors that have contributed towards paying down some of that amount. But am I correct that Xela has not contributed any money towards paying the judgment debt?

A. I have no idea.

323. Q. If you take a different position that Xela has paid any money towards paying down the judgment debt, will you let me know?

A. I don't know.

THE DEPONENT: Should I be letting him know?

MR. RODRIGUEZ: What's the question?

MR. BORTOLIN: It's whether -- I'm putting to you that Xela has not put any money towards paying down the judgment debt, and I just want to make sure we're on the same page about that and that you don't take a different position.

MR. RODRIGUEZ: I think his answer was that he does not know whether or not Xela has paid any money or not.

THE DEPONENT: I don't know if they could or not.

BY MR. BORTOLIN:

324. Q. And if you don't know the answer to

that question who would?

A. Mark Korol.

325. Q. Okay, anyone else?

A. I don’t think Mark Korol, I don’t even think is working for Xela anymore, but he would have been the lawyer at the time, I guess, but whatever has happened since I don't know.

326. Q. Is there anyone else other than Mark Korol who would know?

A. Rodriguez or Gutierrez would probably know.

327. Q. Sorry let me make sure that’s clear for the record, because of course there are a couple of Juans. Did you say that Juan Rodriguez who’s sitting to your left would know the answer or that Juan Gutierrez?

A. Juan Gutierrez.

328. Q. I want to make reference to a corporate organizational chart of Xela, which was originally evidence in the application from which the judgment we’re enforcing arises. And I had sent that in advance, and I'll check if your lawyer has a copy of that with him?

MR. RODRIGUEZ: I don't. I do have it in my email though.

BY MR. BORTOLIN:

329. Q. And while he’s looking that up, if you don't mind my asking a question while he does that. We were talking about whether Mr. Korol was still an officer of Xela. Can you tell me what your understanding is of who the current officers and directors of Xela are?

A. You mean now?

330. Q. Yes, now?

A. As far as I know Juan Gutierrez and I are the only ones, but I don't -- I don't -- Korol was just the secretary. He was not part of the board. So I can’t answer that very well, because we've done nothing.

We've had no meetings or anything in the last two years, over two years, maybe more than that. So nothing has transpired, as far as I know. There's no money -- nothing we can do.

331. Q. Sorry continue?

A. Well no, that's it.

332. Q. Xela's incorporated under the *Ontario Business Corporations Act*. Are you familiar with the obligation of an OBCA corporation to update the names of its officers and directors with the registry maintained by the Ministry of Government Services?

A. I suppose so. We're dating back now a long ways, but we reviewed financial things at the meetings and we're always on the dockets.

370. Q. And was Xela at least at the time exercising some oversight over the subsidiary companies?

A. Yes.

371. Q. And so, is it your understanding that that oversight has stopped?

A. Yes -- well, I assume so. Juan is still involved; Juan Gutierrez is still involved with them. So, what is taking place I can't answer that. But Xela basically is defunct. The companies I think are mostly running pretty much on their own.

372. Q. And so, if anyone knew whether Xela was exercising any oversight over the subsidiaries it would be Juan Gutierrez?

A. Yes, I think so yeah.

373. Q. Can I ask you to follow up and ask Juan whether he's exercising, as president of Xela, whether he's exercising any oversight over any of the direct or indirect subsidiaries?

MR. RODRIGUEZ: Why can't you ask him yourself, since he's in Toronto?

MR. BORTOLIN: I would like to. I examined

384. Q. Seeing as you're not familiar with the document, I know it doesn't do any good to put it in front of you, but I'll represent to you that it lists you as a director of not just Xela Enterprises, which we've talked about, but also of Tropic International Ltd. Is that correct?

A. Yeah, I believe I was on that for a while.

385. Q. And is that another company that hasn't met in the last two years?

A. That is correct.

386. Q. You're also listed as a director of Lisa, S.A. incorporated in Panama. Is that correct?

A. What?

387. Q. This chart that was produced to us as an answer to an undertaking given on your last exam, or an answer to a refusal that Xela was ordered to answer, it lists you as a director of Lisa S.A. Is that correct?

A. I believe so.

388. Q. You believe so, you said?

A. Yes.

389. Q. And that's still the case today that you're a director of Lisa, S.A.?

A. Yes.

390. Q. The document also listed you as the president of Lisa, S.A. Is that correct?
A. Yes.
391. Q. And is Lisa, S.A. a company that has met within the past two years?
A. Well, not really, not that was done lately.
THE DEPONENT: Are you aware of anything?
MR. RODRIGUEZ: No.
THE DEPONENT: I don't think so.
BY MR. BORTOLIN:
392. Q. And that document also listed David Harry as another director and officer. Are you familiar with him?
A. Yes.
393. Q. And are you -- if Lisa were to hold a meeting would you coordinate that with him and what would you do to have a meeting?
A. Well, I'm not here for Lisa; are we?
394. Q. What we're here for is Xela, and I don't know if you're familiar with the background on this.
A. Xela -- I mean, Lisa under Gavinvest?
395. Q. Yes.
THE DEPONENT: Are we supposed to be

--- REFUSAL

BY MR. BORTOLIN:

413. Q. The financial statements that we received as answers to undertakings go up to, as far as I can tell, June of 2017. Are you aware if Xela or any of its subsidiaries, direct or indirect, has produced another financial statement more recent than that since then?

A. No, I have no idea -- repeat the date that you said they were to?

414. Q. So I just want to make sure I have the most up-to-date financial statements as possible of Xela and its subsidiaries. So my question was first whether you believe any more recent statements than June 2017 existed?

A. June 1917?

MR. RODRIGUEZ: 2017.

THE DEPONENT: This year?

MR. RODRIGUEZ: No, last year.

THE DEPONENT: Well, okay. I didn't even know there was statements then, so...

BY MR. BORTOLIN:

415. Q. And who would be aware of whether more recent financial statements existed?

A. I would suppose Mark Korol, but again

he's not working with Xela anymore, so because he wasn't getting paid either.

416. Q. So if not Mark Korol, then who?

A. Well there's only one left and that's Juan Gutierrez, and he doesn't have any money either.

417. Q. And so again, even though I know your answer to this I still have to ask it. Can I ask you to inquire of Juan to provide me with copies of any more recent financial statements for Xela or any of its direct or indirect subsidiaries, subsequent to June 2017, that have not been provided to us?

A. No.

--- REFUSAL

BY MR. BORTOLIN:

418. Q. Have you Mr. Shields received any compensation from Xela since your last examination?

A. No.

419. Q. Have you had any expenses reimbursed since your last examination in July of 2017?

A. No.

420. Q. And Mr. Rodriguez is representing you today. Is he being compensated by Xela for attending today?

A. He's doing it; I take it as an old friend of me and our past relationship. I don't know

any more than that. I was a good friend of Arturo and that's why I stayed on the board, and he has been very gracious in supporting me through this.

421. Q. I've asked about financial statements subsequent to what we've received. I'm going to ask a similar question with respect to meeting minutes. The ones we have are dated in 2016 and 2017 for the group of four companies that I mentioned earlier on in the examination.

To your knowledge are there any other meeting minutes, either from different companies among Xela and its direct and indirect subsidiaries, or that are more recent than 2017?

A. No.

422. Q. And if such documents did exist would Juan be the one that knows about them?

A. I suppose.

423. Q. And I suggest Juan because he was the answer to similar answers I'd asked before. Is there anyone else who would aware?

A. He's the most likely one. I can't -- well, Mark Korol would be the only other one, but again he's not part of the Lisa -- Xela anymore.

424. Q. And so when you say that, I haven't asked you to make any inquiries of Mr. Korol, as was

MARGARITA CASTILLO
Moving Party

-and-

XELA ENTERPRISES LTD. et al.
Respondents

Superior Court File No.: CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

WRITTEN SUBMISSIONS OF MARGARITA CASTILLO

(Motion of the Receiver Returnable October 29, 2019)

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